No. 2942

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT and ORA WRIGHT, by GERTRUDE WRIGHT, their Guardian *ad litem,*
Defendants in Error.

ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR

In Error to the United States District Court of the Southern District of California, Northern Division.

L. L. CORY,
ELMER WESTLAKE,
Attorneys for Plaintiff in Error.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

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At the conclusion of the oral arguments in this case, May 9th, 1917, plaintiff in error requested and was granted permission to submit, within ten days, additional printed argument with respect to the contentions advanced by defendants in error in their printed brief and upon the oral argument.

Before proceeding with the discussion of the points made by counsel for defendants in error in their brief and upon the oral argument, certain statements in the printed brief under the heading "Statement of Case" require comment. The first

of such statements is that at the time of the accident the train was running "at a rate of about 42 miles per hour" (Brief, p. 2). All of the evidence is to the effect that the train was going at the rate of 30, or about 30, miles an hour (Tr. pp. 50, 58 and 60).

The next statement demanding attention is this: "Then as soon as his attention could be taken from the danger of trains coming from the south he saw the train coming from the north at a point 300 or 400 feet from the crossing. This was at the instant that the front wheels of the truck were going upon the main track of the railroad at the crossing" (Brief, p. 4).

It will be noted that counsel's statement assumes that in traveling a distance of 145 ft. (the only point where Tucker and Wright looked in the direction of the approaching train) at the rate of 3 or 4 miles an hour, one could not with safety look again to the north but must keep his eyes glued to the south. At the rate of 4 miles an hour it would have taken the truck about 24 seconds to traverse the 145 ft.; at 3 miles an hour about 32 seconds. To say that one cannot with perfect safety glance in both directions half a dozen times within that distance at that speed is directly opposed to common knowledge. One has but to make the experiment to demonstrate the accuracy of our statement and the absurdity of counsel's position. Nor does the evidence show that when Tucker first saw the train

"the front wheels were going upon the main track of the railroad at the crossing." Tucker stated (Tr. p. 39) "It had reached the point where the truck was *practically* going on to the main line track" and (Tr. p. 45) "the front wheels of the truck were just *about* on the main track." If the front wheels were on the main track and the truck, which was not over 12 ft. in length, was traveling 3 miles an hour, and the train was 400 ft. distant and traveling 30 miles an hour, the truck would have traveled one-tenth the distance covered by the train or 40 ft., and the track being 4 ft. 8½ in. in width, the rear end of the truck would have been about 23 or 24 ft. in the clear by the time the train arrived at the crossing. If the train was going 42 and the truck 3 miles an hour, the truck would have covered one-fourteenth of 400 ft. or between 28 and 29 ft., and its rear end would have been 11 or 12 ft. in the clear. Counsel's final conclusion, as evidenced by the brief, is that the train was 300 ft. distant and the truck was traveling 4 miles an hour and the train 42 miles an hour. The truck would therefore have traveled between 28 and 29 ft. by the time the train had reached the crossing and the rear end of the truck would therefore have been 11 or 12 ft. in the clear. These figures demonstrate conclusively that the truck was not on the main track when Tucker first saw the train, but that (as Tucker says, Tr. p. 45) "The front wheels of the truck were just about on the main track, and *then my only thought was to put on speed and see if I could get across in front of it.*"

Here we respectfully direct the attention of the Court to the following particularly apt excerpt from the opinion of the case of *Pepper* vs. *Southern Pacific Co.*, 105 Cal. 389:

> "It is said, however, that the train was running at a rate of speed faster than usual. This could not affect the question, since the deceased could not have been misled by the unusual speed of the train, unless he saw or heard the train and undertook to cross ahead of it; *and to make such attempt and fail is conclusive evidence of negligence.*"

Upon the oral argument counsel for defendants in error emphasized three propositions, namely:

1. That the negligence of Tucker was not imputable to Wright;

2. That the question of contributory negligence is one of substantive law concerning which the decisions of the State Courts are not binding upon the Federal tribunals, and that in the Federal Courts the question of contributory negligence is always one of fact for the jury and is never a matter of law; therefore, that the Court below was not in error in denying the motion of plaintiff in error for a nonsuit, or a directed verdict in its favor; and

3. That the Court below was in error in eliminating from the consideration of the jury the so-called "last clear chance" doctrine; that a case should not be reversed because the jury has disregarded an erroneous instruction; and, we assume,

counsel concludes (although not so stated), that the Court may conjecture that the verdict was based by the jury upon an instruction contrary to that which was given, and should, therefore, justify the verdict on the omitted instruction.

To these we will reply in the order named.

1. *That the negligence of Tucker was not imputable to Wright.*

Little can be added to our former brief upon this point, except to direct the attention of the Court to the undisputed fact that Wright had rented the truck and was paying the rental for it. He had rented it the previous day and for the day of the accident (Tr. p. 43). Tucker was "demonstrating the truck to Mr. Wright, and *was also doing some work for him.*" (Tr. p. 43). "Prior to the time of the accident that morning we had hauled one load of raisins to Del Rey." "Mr. Wright had been riding with me on this truck during that morning up to the time of the accident." (Tr. p. 33).

In other words Wright had rented the truck for his own business and the truck had been so used during one whole day and a portion of the next—hauling Wright's raisins—and Tucker was the driver, and Wright and Tucker were certainly engaged in a joint or common enterprise, and notwithstanding Tucker's statement that Wright had nothing to do with the physical or mechanical operation of the truck, it is nowhere denied, and could not

well be, that Wright had the absolute right to say to Tucker where and when he should drive it. It therefore seems to us that, as a matter of law, Tucker's negligence was imputable to Wright.

2. *That the question of contributory negligence is one of substantive law concerning which the decisions of the State Court are not binding upon the Federal tribunals, and that in the Federal Courts the question of contributory negligence is always one of fact for the jury, and is never a matter of law; therefore, that the Court below was not in error in denying the motion of plaintiff in error for a non-suit, or a directed verdict in its favor.*

With counsel's first premise that the question of contributory negligence is one of substantive law, concerning which the decisions of the State Courts are not binding upon the Federal tribunals, we have no quarrel. With his second premise, namely, that in the Federal Courts the question of contributory negligence is always one of fact and is never a matter of law, we take decided issue. Reliance is placed by counsel upon two cases, namely, *Jones* vs. *East Tennessee Ry. Co.,* 128 U. S. 443, and *Grand Trunk Ry. Co.* vs. *Ives,* 144 U. S. 408. As stated on page 37 of the brief: "Upon the authorities cited heretofore, and especially upon the authority of *Jones* vs. *East Tennessee Ry. Co.,* the question of the negligence of the deceased was a proper question for the jury, and it would have been error for the Court to have taken that question from the jury."

In neither case can we find anything which should afford comfort to opposing counsel.

The Jones case was decided in 1888; it was not a crossing case; the evidence conflicting. As the Court itself said:

> "The plaintiff himself states that he was in the depot of the defendant on business; that the passenger platform was alongside the tracks, which ran between it and the depot; there was also a sidetrack that went through the depot; that he passed out of the depot by the usual way, and was struck between the wall of the depot and the platform. He further says that the way he was going he could not see a train approaching from the east because there was a car on the side-track, and he had no warning of any approaching train, although he listened as he went out of the depot. There is also some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished. On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depot; that he knew the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him."

The mere recital of these facts shows that reasonable men might fairly differ upon the question as to whether Jones was negligent, and the Supreme Court was clearly right in holding that the determination of that question was for the jury.

In the Ives case the Court reiterates the accepted principle that:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court."

The lower Court and the Supreme Court permitted the Ives case to go to the jury as to contributory negligence of Ives on the theory that reasonable men might fairly differ as to whether or not there was negligence. The facts of that case were such that it might almost be said *without question* that reasonable men might differ as to negligence.

The road on which Ives traveled toward the track was on an up-grade; the view was obstructed until Ives reached a point 15 to 20 feet of the track; he would have to stop his horses within 8 feet of the track before he could see in both directions; there were other railroads than defendant running side by side with it; another train of one of the other railroads was actually approaching and passing when Ives reached the tracks; there was noise and confusion, and possibly noise and confusion of signals; Ives stopped before driving onto the track, presumably to listen for trains; and while watching

a passing train of another road he was struck by a train of defendant.

In this obstructed, confused and dangerous situation, it might reasonably be held that Ives stopped his horses at the safest place in which he could do so, and that he exercised all the care that was incumbent upon him; therefore, the fact that in that case the Court said the question of contributory negligence was for the jury does not appear to affect the contention that in the present case the question is *not* for the jury. Even in the Ives case the Court cites with approval Pierce on Railroads, page 343, to the effect that a traveler upon a highway approaching a railroad crossing ought to make vigilant use of his senses of sight and hearing in order to avoid a collision, and should listen for signals and look in the different directions from which a train may come, and that if by neglect of this duty he suffers injury from a passing train he cannot recover from the company.

Wright neglected every duty incumbent upon him when about to cross a railroad track; the view was absolutely unobstructed for at least 145 ft. before he reached the track; there was no confusion of passing trains or other vehicles; there was no other confusion of sound; there was no emergency to distract his attention; he had but to lift his eyes to see the approaching danger; he had to cross two switch tracks before he came to the main track.

In the Ives case, the Court states the rule that where the facts are such that all reasonable men must draw the same conclusion from them, then the question of negligence is one of law for the Court. If the instant case is not based on facts such that all reasonable men must draw the same conclusion as to Wright's negligence, then we personally cannot conceive of the existence of such a case and the rule cited in the Ives case is mere verbiage.

Neither the Jones case nor the Ives case pretends to discard the principle enunciated in *Railroad Co.* vs. *Houston,* 95 U. S. 702, where the Court (at page 702) says:

> "But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the

> defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the Court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

or to overrule the case of *Schofield* vs. *Chicago & St. Paul Ry. Co.,* 114 U. S. 615, where, at page 617, the opinion states:

> "The ground upon which the Circuit Court directed a verdict for the defendant, 2 McCrary, 268, was, that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test, that, if it would be the duty of the Court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant, if given, the Court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Continental Improvement Co.* vs. *Stead,* 95 U. S. 160, and especially in *Railroad Co.* vs. *Houston,* Id. 697, and arrived at the conclusions of law, that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look, but that, in such case, he

would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that a train was approaching; that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking.

These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to. In *Railroad Co.* vs. *Houston,* it was said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars, was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass,

and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant.' The Court added, that an instruction to render a verdict for the defendant would have been proper.

These views concur with those laid down by the Supreme Court of Minnesota, in *Brown* vs. *Milwaukee Railway Co.,* 22 Minn. 165, and are in accord with the current of decisions in the courts of the States.

It is the settled law of this Court, that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co.* vs. *Munson,* 14 Wall. 442; *Pleasants* vs. *Fant,* 22 Id. 116; *Herbert* vs. *Butler,* 97 U. S. 319; *Bowditch* vs. *Boston,* 101 Id. 16; *Griggs* vs. *Houston,* 104 Id. 553; *Randall* vs. *Baltimore & Ohio Railroad Co.,* 109 Id. 478; *Anderson County Comrs.* vs. *Beal,* 113 Id. 227; *Baylis* vs. *Travellers' Insurance Co.,* Id. 316. This rule was rightly applied by the Circuit Court to the present case."

Be that as it may, the later decisions of the United States Supreme Court are in strict accord with the statement of the law for which we are contending. In that connection we quote from the following cases:

"We are of opinion that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a

jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co.* vs. *Houston,* 95 U. S. 697; *Schofield* vs. *Chicago, Milwaukee & St. Paul Railroad,* 114 U. S. 615; *Delaware, Lackawanna &c Railroad Co.* vs. *Converse,* 139 U. S. 469; *Aerkfetz* vs. *Humphreys,* 156 U. S. 418."

Elliott vs. *Chicago, Milwaukee &c Railway Co.,* 150 U. S. 245 (at p. 246).

"For several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country, through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching, either from the north or the south, was cut off by the banks of the excavation on either side of the highway; but at a distance of about forty feet before reaching the track the road emerged from the cut, and the view up the track for about 300 feet was unobstructed.

At the time of the accident, Freeman was driving along the highway, going eastward from the town of Elma in a farm wagon drawn by two horses at a slow trot. He was a man thirty years of age, with no defect of eyesight or hearing, and was familiar with the crossing, having frequently driven the same team over it. The horses were gentle and were accustomed to the cars.

The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary and has been affirmed so many times by this

Court, that a mere reference to the cases of *Railroad Company* vs. *Houston,* 95 U. S. 697, and *Schofield* vs. *Chicago & St. Paul Railway Co.,* 114 U. S. 615, is a sufficient illustration of the general rule."

* * * * * * *

"So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300 feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the Court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken. The comments of Mr. Justice Field in *Railroad Company* vs. *Houston,* 95 U. S. 697, 702, are pertinent in this connection: 'Negligence of the company's employes in these particulars' (fail-

ure to whistle or ring the bell) 'was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant.'

If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.

The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions or other peculiar circumstances tending to mislead the in-

jured party as to the existence of danger in crossing the track. (Italics ours.)

Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor."

Northern Pacific R. R. Co. vs. *Freeman,* 174 U. S. 379.

The language of the italicized portion of this opinion is significant. It has direct application to the facts of the Jones and Ives cases upon which defendants in error so strongly rely. In the present case there were no obstructions interfering with the view of approaching trains, there was no confusion caused by trains approaching simultaneously from opposite directions, there was no unusual noise, there were no peculiar circumstances tending to mislead either Wright or Tucker as to the existence of danger in crossing the track. If either had looked as late as the moment when they were going upon the first or even second switch track they would have seen the train and the accident would have been avoided.

In this connection it might be well to briefly notice counsel's position that because Wright and Tucker looked at a point 145 feet from the crossing, and could then see no train for a distance of 1600 feet *because no train was there,* and that they therefore acted as reasonably prudent men in that they knew

that the ordinance of Selma prescribed a train speed limit of 8 miles an hour, and that if that ordinance were not violated they would have ample time to cross the track before a train would arrive at the crossing. That is, they had 145 feet to go, traveling 4 miles an hour, and the train 1600 feet to go, traveling at not more than 8 miles an hour. The fallacy of counsel's argument is best illustrated by the following statement appearing on page 17 of his brief:

> "But we do contend that an ordinary prudent man would not only have a right to assume, but would ordinarily assume that no train would be operated at that place and under those circumstances at such a reckless rate of speed as 42 miles or even 30 miles per hour. If the train had been operated at 12 or 15, or possibly 20 miles per hour, a reasonable man might have expected the same, but to say that any reasonable man would expect a heavy train to be permitted to go recklessly through a part of a city (where there were numerous crossings being used by the public), without ringing a bell or sounding a whistle, and the steam shut off so that the train made practically no noise, would, as it seems to us, be equivalent to saying that reasonable men must believe that operators of railroad trains are not only persistently and wantonly negligent, but that they are so wantonly and wilfully negligent as to be in such cases criminals. This a reasonable man cannot be expected to assume or believe. It would seem therefore that the question of exactly where and when the driver of this truck should have observed the track of the railroad from whence the train came, was a question proper to be submitted to the jury if that question had been an issue at all in this case."

It is not the law of California, nor that laid down by the Supreme Court of the United States for application by the Federal Courts, that a person approaching a railroad crossing is authorized to assume that a person operating a train will not be negligent in that operation.

We quote from the case of *Huston* vs. *Southern California Ry. Co.,* 150 Cal. 703, where it is said:

> "It is not the law of this State that a person approaching a railroad crossing is authorized to assume that the person operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but is opposed to the law as laid down in the decisions of this State and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases."

In that case the Court points out that the rule adopted is that obtaining in the Supreme Court of the United States and in the Federal Courts generally, and is therefore binding here.

The principle is approved in the case of *Thompson* vs. *Southern Pacific Co.,* 161 Pac. 21, referred to on pp. 60 to 63 of our brief herein.

3. *That the Court below was in error in eliminating from the consideration of the jury the so-called "last clear chance" doctrine; that a case should not be reversed because the jury has disregarded an erroneous instruction; and, we assume, counsel concludes (although not so stated), that the court may conjecture that the verdict was based by the jury upon an instruction contrary to that which was given, and should, therefore, justify the verdict upon the omitted instruction.*

This contention of counsel for defendants in error is based upon the erroneous assumption that the Court was bound to adopt the doctrine that the "last clear chance" applied not only where the trainmen *actually knew* of the perilous position of the traveler, but also where, *by the exercise of proper care, they should have known thereof.*

Counsel admits (Brief, p. 45) that the decisions of the courts of different jurisdictions are conflicting. There is no fixed rule in the United States Courts. The Ives case, 144 U. S. 408, did not involve the doctrine, and is not even touched upon by the Court except in a statement of the general rule concerning contributory negligence and its qualification (p. 429). The opinion does not even pretend to define the doctrine, or to include its elements.

The *Inland etc. Coasting Co.* vs. *Tolson,* 139 U. S. 551, does not discuss the distinction. The expression simply is—"yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown

that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

It clearly appears in that case that the employes of the steamship company had actual knowledge of Tolson's dangerous position, and it was with respect to that fact that the language of the Court was employed. It cannot, therefore, be considered as authority for the position of defendants in error. The Court below simply adopted the rule enunciated in Section 238 of White's Supplement to Thompson's Commentaries on the Law of Negligence, as follows:

> "Most American courts subject the rule that there can be no recovery by an injured person where his own negligence contributes in any degree to the immediate cause of the injury to the qualification that the person causing the injury was *without knowledge* of the perilous position of the injured person in time to avoid the injury by the exercise of ordinary care."

This is also the unquestioned rule in California.

> *Waterman* vs. *Visalia Electric R. R. Co.,* 23 Cal. App. 350;
>
> *Tucker* vs. *United Railroads,* 171 Cal. 703;
>
> *Starck* vs. *Pacific Electric Ry. Co.,* 172 Cal. 281,

which rule the Court was required to adopt. There being, therefore, no evidence that the trainmen actually discovered the deceased in a position of peril, the doctrine of "last clear chance" had no appli-

cation and the Court was correct in so instructing the jury.

Furthermore, the "last clear chance" doctrine cannot be invoked where the negligence of the parties is concurrent and that of the person injured continues up to the time of the accident.

Callery vs. *Morgan's L. & T. R. & S. S. Co.,* 72 So. 222;

Dyerson vs. *Union Pac. R. R. Co.,* 7 L. R. A. (N. S.) 132, and note;

Holmes vs. *South Pacific Coast Ry. Co.,* 97 Cal. 161;

Stephenson vs. *Parton,* 155 Pac. Rep. 147.

It is clear in this case that the negligence of both Wright and Tucker continued up to the very time of the accident. Therefore the Court was right in instructing the jury that the "last clear chance" doctrine did not apply.

But, even if it is assumed that the Court erred in giving the instruction in question, what is the effect? It does not appear that the jury disregarded it. The presumption must be that they followed the instruction, as it was their sworn duty to do. In this case the defendants in error have no fault to find with the verdict. Plaintiff in error is complaining, but not because this alleged erroneous instruction was given. Defendants in error are in no position to avail themselves of the error, if error was committed. It would be a harsh rule which would im-

pose upon the plaintiff in error in this case the penalty of a large verdict of $12,000.00 on the assumption that the jury disregarded an erroneous instruction when there is absolutely no evidence in the record to justify such assumption, and there is no law to warrant such assumption. In fact, all presumptions are to the contrary. The doctrine of "last clear chance" was by the Court eliminated from the consideration of the jury. The jury simply held that the plaintiff in error was negligent and that the deceased was guilty of no contributory negligence. This Court should not speculate upon the subject, but should presume that the jury performed its sworn duty to abide by the instructions of the Court, and decided the case in accordance with such instructions.

Abalas vs. *Consolidated Const. Co.,* 164 Pac. Rep. 19.

For aught that appears in this case it may well be that the instruction referred to was given by the Court at the request of the defendants in error. Certainly it does not appear from the record that the defendants in error took any exception to the giving of the instruction, and as all intendments are in favor of the action of the Court it will be presumed upon appeal that the instruction was either given at the request of the defendants in error, or if it were given by the Court on its own motion, or at the request of the plaintiff in error, that defendants in error took no exception thereto.

See

Sewell vs. *Price,* 164 Cal. 265;

Estate of Gamble, 166 Cal. 253.

"On appeal all intendments are in favor of regularity of action of the trial court. Error will never be presumed but must affirmatively appear."

People vs. *Douglas,* 100 Cal. 1.

We respectfully submit—

1. That Tucker's negligence was imputable to Wright;

2. That Wright was himself negligent;

3. That the negligence of either Tucker or Wright, or both, contributed to the accident, and was the proximate cause thereof;

4. That such negligence existed in this case as a matter of law, and that the Court should have granted the motion for a non-suit, or a directed verdict in favor of plaintiff in error;

5. That the "last clear chance" doctrine has no application here, and the Court correctly so instructed the jury; and that, even if the Court was in error, such error cannot be availed of by defendants in error.

It is therefore respectfully submitted that the judgment should be reversed.

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